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NO. 94-2063

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

PRIMEDICAL, INC., et al.,

Petitioners,

v.

ALLIED INVESTMENT CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Amendment to the constitution restricts the use of summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

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BRIEF IN OPPOSITION

Respondent, Allied Investment Corporation,[1] respectfully requests that this Court deny the petition for writ of certiorari seeking review of the District of Columbia's unpublished memorandum opinion. The opinion is reprinted in the petition for certiorari at Appendix A-21.

[1] Allied Investment Corporation has the following corporate affiliates: Allied Capital Advisors, Inc., Allied Capital Corporation, Allied Capital Corporation II, Allied Capital Lending Corporation and Allied Capital Commercial Corporation.

STATEMENT OF THE CASE

The gist of plaintiffs' allegations in the case below was that Primedical, Inc. ("PMI") had a corporate opportunity to purchase a group of health care facilities, which opportunity was usurped when a new corporation was formed by two top officers of PMI to serve as an alternate vehicle for the purchase, with funding to be provided in part by defendant Allied Investment Corporation ("Allied"). According to plaintiffs' allegations, in connection with the formation of the new corporation, Primedical Corporation ("PC"), Allied promised that PMI shareholders would be given a 30 percent interest in the new company, PC. In fact, PMI shareholders did not receive stock in the new company. Rather, the equity was divided between Allied and the two PMI officers, Old and Ellsworth.

By the time of Allied's motion for summary judgment only four of the original ten counts of the complaint remained, the others having been disposed of on motions to dismiss. Allied asserted as grounds for summary judgment on the remaining counts that: 1) all of the plaintiffs lacked standing, 2) all of the claims were void because champertous, 3) the breach of contract, breach of fiduciary duty and tortious interference claims were barred by the statute of limitations, 4) all of these claims plus the fourth for conversion, were unsupported by the facts and their requisite elements not substantiated.

With respect to the counts susceptible to disposition on statute of limitations grounds, Allied contended, and the district court found, that the alleged "usurpation" of the corporate opportunity with the attendant freeze-out of PMI shareholders occurred in April 1987 and therefore outside the limitations period. All of the events of April 1987 on which the court's holding was based were undisputed facts. The

plaintiffs' argument, rejected by the court, was simply that other, later events -- such as the second closing on PC's purchases of the health care facilities (August 1987) rather than the first closing (April 1987) -- should be the benchmarks for calculating when the causes of action arose.

With respect to the final count for conversion, the district court held that the claim was "entirely unsupported by the record." Appendix to Petition at A-18.

After full briefing and oral argument, the Court of Appeals affirmed the district court's judgment in its entirety and rejected a subsequent motion for rehearing.

The petition for certiorari is essentially a plaint that the courts below misapprehended the facts and thus incorrectly fixed the time when the statute of limitations began to run and failed to find substance in the conversion claim.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *The petition seeks to put before the Court questions of fact repeatedly resolved by the courts below.* The petition unabashedly rests on assertions of factual error.[2] It is a plea for this Court to review the evidence, a function the Court consistently declines. "We do not grant

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[2] E.g., "The District Court ... erroneously assumed" facts; "The District Court's finding is mistaken;" "These findings of fact are based upon facts in dispute;" "There are numerous errors of fact in the District Court's opinion;" "At best these are disputes of material fact and at worst clearly erroneous findings of fact by the district court;" "The Court of Appeals simply ignored these errors, or ... adopted them as its own; "The Court of Appeals misunderstood the facts." Petition at 18-21, 23.

a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

2. *The petition raises no significant constitutional issue.* Petitioners attempt to brush a constitutional coloration over an otherwise utterly mundane situation by suggesting that a disappointed party, who refuses to concede the correctness of the evidentiary review had on summary judgment, is entitled to raise a claim of deprivation of the right to a jury trial, based on the self-declared conclusion that there really were triable issues of fact that the courts below somehow missed. This simply will not do.

> If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence.

Dick v. New York Life Ins. Co., 359 U.S. 437, 455-56 (Frankfurter, J., dissenting).

3. *The petition raises no issues of importance to anyone other than the parties to the particular case.* Premised solely upon a contention that the evidentiary

reviews below were incorrect, the petition has no significance beyond the parties to this particular case. In an attempt to elevate it above the particular, petitioners contend, without a shred of substantiation, that misapplication of Rule 56, Fed. R. Civ. P., is endemic and "[i]f this Court does not curtail this trend, trial by jury in civil cases will eventually become extinct and the Seventh Amendment rendered meaningless." Petition at 26. Suffice it to say that there is no evidence of any such impending apocalypse.

4. *Petitioners are without standing*. Respondents have pointed out in the proceedings below that none of the plaintiffs in the case have standing to press the claims asserted in the complaint. While the courts below had no need of ruling on the standing issue because the case was otherwise disposed of, respondents would demonstrate in this Court the absence of standing. Grant of the writ would therefore prove improvident.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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